IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82 6257

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SUPREME COURT

GEORGE R. FULK, AND RACHEL LEASH, individually and on behalf of all other persons similarly situated.

Appellants,

v.

TIMOTHY D. MORTIZ, M.D., et al.,[1] individually and as a representative of a class of persons similarly situated.

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JURISDICTIONAL STATEMENT

ROBIN M. KENNEDY
College of Law Legal Clinic
University of Toledo
2801 W. Bancroft St.
Toledo, Ohio 43606

DALE A. WILKER
Advocates for Basic Legal
Equality, Inc.
740 Spitzer Building
Toledo, Ohio 43604

Counsel for Appellants

February, 1983

[1] Kenneth D. Gaver, M.D., individually and in his capacity as Director of the Ohio Department of Mental Health and Mental Retardation, Clem Davis, individually and in his official capacity as the Chief of the Division of Business Administration for the Ohio Department of Mental Health and Mental Retardation, Thomas F. Phillips, individually and in his official capacity as Supervisor of the Bureau of Support for the Bureau of Support for the Ohio Department of Mental Health and Mental Retardation, and Jankiel Barg, M.D., in his official capacity as Superintendent of the Toledo Mental Health Center, Casper Weinberger, individually and in his official capacity as Secretary of the Department of Health, Education and Welfare, and James B. Cardwell, individually and in his official capacity as Commissioner of the Social Security Administration.

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INTRODUCTION

This is an appeal from the final order overruling plaintiffs' motion to alter or amend judgment of the United States District Court for the Northern District of Ohio, Western Division entered October 15, 1982, which affirmed the district court's prior order entered September 28, 1981 ruling against plaintiffs claims.

This statement is presented to show that the Supreme Court of the United States has jurisdiction in this matter and that substantial questions are presented by the decision of the district court.

OPINIONS BELOW

The order of the district court overruling plaintiffs' motion to alter or amend from which this appeal is taken is not yet reported. A copy is attached hereto as Appendix C.

The order of the district court affirmed by its later order overruling plaintiffs' motion to alter or amend is not yet reported. A copy is attached hereto as Appendix A.

JURISDICTION

The appellants are representatives of 1) a class of persons who have been involuntarily committed to state institutions for the mentally ill in Ohio and are required to pay for the costs of their daily support and care and 2) a class of all social security recipients who are, have been, or will be involuntarily confined to state institutions for the mentally ill in Ohio and who have had or will have representative payment determinations made pursuant to 42 U.S.C. §405(j). Appellant filed a complaint on June 13, 1974, seeking declaratory and injunctive and legal relief against federal defendants who were, and whose successors are, responsible for the implementation of 42 U.S.C. §405(j) and against state defendants who were and whose successors are responsible for the implementation of §§ 5121.03, 5121.04, 5121.06, and 5123.40 of the Ohio Revised Code and collection of costs of care.

The jurisdiction of the district court was predicated upon 28 U.S.C. § 1337, 28 U.S.C. §1343(3) and(4) and 28 U.S.C. §1361 and 5 U.S.C. §702 in the complaint as amended. In its order of December 11, 1974,

the district court ruled upon these jurisdictional bases. The court found no jurisdiction under 28 U.S.C. §1337, 28 U.S.C. §1361. The court concluded that jurisdiction over federal defendants was available under 5 U.S.C. §701-706. (§702 of the Administrative Procedure Act) and apparently accepted jurisdiction over state defendants under 28 U.S.C. §1343(3) and (4).

A three-judge district court was convened to hear the matter.

On September 28, 1981, the district court ruled against plaintiffs on all claims and found that the court lacked jurisdiction over federal defendants by virtue of this Court's decision in Califano v. Sanders, 430 U.S. 99 (1977).

On October 15, 1982, the district court overruled plaintiffs' motion to alter or amend judgment. (A copy is attached as Appendix C). The appellants filed their notice of appeal from this order. A copy of the notice of appeal is attached as Appendix D.

The jurisdiction of the court to review by direct appeal the Memorandum and Order of the district court denying the relief sought by Appellants is conferred by 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether Califano v. Sanders, 430 U.S. 99 (1977) precludes federal district court jurisdiction to decide claims of deprivation of due process and equal protection arising out of the appointment of representative payees for social security beneficiaries when the beneficiaries are not provided notice and opportunities to be heard, when hospital administrators are preferred as representative payees over relatives and friends of institutionalized persons, and when appointment of a representative payee is a final decision not subject to administrative appeal.

2. Whether the plaintiffs' due process claims against federal defendants for losses of social security benefits under old regulations are rendered moot by the promulgation of new regulations.

3. Whether the Social Security Administration's preference of hospital administrators as representative payees over friends and relatives of institutionalized social security beneficiaries violates the Equal Protection requirement of the Fifth Amendment.

4. Whether the federal and state defendants' action under the representative payee system violates this court's decision in Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973) and the 42 U.S.C. §407 exemption of benefits from execution, levy, attachment, garnishment or other legal process.

5. Whether the Fifth Amendment Due Process Clause requires that the Social Security Administration provide adequate written notice and opportunity to be heard prior to the determination that the beneficiary is no longer capable of managing his or her own benefits and prior to the appointment of a representative payee.

6. Whether the seizure of social security benefits by state officials was in bad faith and violated plaintiff's rights under 42 U.S.C. §407.

STATEMENT OF THE CASE

This action was originally filed on June 13, 1974 on behalf of George Fulk whose social security payments were being routinely seized by the Ohio Bureau of Support to pay for the alleged cost of Fulk's care at the Toledo Mental Health Center (TMHC). Fulk was an involuntary patient at TMHC who was transferred there from Lima State Hospital. While at Lima State Hospital, Fulk did not have to pay for his care by virtue of a state statute that exempted persons involuntarily committed for criminal acts from liability for the cost of their care and treatment. O.R.C. §5123.40. This action was also filed on behalf of Rachel Leash an involuntary patient at TMHC.

On April 12, 1976, the case was conditionally certified as a class action on behalf of a plaintiff class consisting of:

> All persons who have been involuntarily committed to institutions for the mentally ill under the control of the Ohio Department of Mental Health and Mental Retardation and are required, pursuant to §§5121.03, 5121.04, 5121.06 and 5123.40 of the Ohio Revised Code to pay the costs of their daily support and care while in such institutions,

and on behalf of a plaintiff sub-class consisting of:

> All social security recipients who are, have been, or will be involuntarily confined to institutions for the mentally ill under the control of the Ohio Department of Mental Health and Mental Retardation who have had, or currently have, representative payees appointed to manage their social security benefits, or will in the future be threatened with such appointments, pursuant to 42 U.S.C. 406(j).

A defendant class was also conditionally certified consisting of all superintendents of public hospitals for the mentally ill in Ohio. State defendants included the Director of the Ohio Department of Mental Health and Retardation, that department's Chief of the Division of Business Administration, the Supervisor of the Ohio Bureau of Support and the Superintendent of the Toledo Mental Health Center. Federal defendants named were the Secretary of Health, Education and Welfare and the Commissioner of the Social Security Administration. All defendants were named in their individual and official capacities.

The plaintiffs asserted five claims for relief:

I. That the plaintiffs were deprived of their liberty by commitment for rehabilitative and custodial treatment to institutions under the control of the Ohio Department of Mental Health and Mental Retardation, Title 51 O.R.C. §5122.47, and were required to pay for their daily support and care while in the institution, Title 51, O.R.C. §§5121.03, .04, .06 and .40. People incarcerated in state penal institutions under the Ohio Department of Rehabilitation and Corrections, Title 51 O.R.C. §5120.44, who are given rehabilitation treatment the same as that provided to the plaintiffs are not required to pay for their daily support and care while imprisoned. This discrimination against the plaintiffs denies them due process and equal protection of the law;

II. That the state defendants, while requiring the plaintiffs to pay for their care and support while committed, did not provide them with adequate and comprehensive psychiatric treatment in accordance with statutory standards, thus depriving them of due process of law.

III. That the federal defendants failed to provide the plaintiffs with procedural safeguards when designating representative payees for benefits to which plaintiffs are entitled under federal law, 42 U.S.C. §405(j) and (1); 20 C.F.R. §§404.1601-1610, thus depriving them of their property without due process of law:

IV. That the federal defendants in appointing representative payees for committed persons gave preference to state institutions over relatives and friends of the plaintiffs, thus denying the plaintiffs the equal protection of the law;

V. That the federal defendants designating state institutional officials as representative payees resulted in the state officials being able to collect state support costs without proceeding through state legal processes in violation of the federal statutory provisions, 42 U.S.C. §407, that exempts Social Security payments from execution, levy, attachment, garnishment or other legal process, therefore rendering the state defendants liable to the plaintiffs for the amounts received as representative payees and paid over to apply to plaintiffs' support charges by the State of Ohio Bureau of Support.

By stipulation of the parties, plaintiffs' second claim for relief was dismissed without prejudice.

On November 12, 1981 the Court entered judgment against plaintiffs and dismissed their complaint.

THE QUESTIONS ARE SUBSTANTIAL

1. The decision in Califano v. Sanders does not preclude a federal district from assuming jurisdiction to decide claims of deprivation of due process and equal protection arising out of the appointment of representative payees for social security beneficiaries when the beneficiaries are not provided notice and opportunity to be heard, when hospital administrators are preferred as representative payees over relatives and friends of institutionalized persons and when appointments of representative payees are final decisions not subject to administrative appeal.

In its ruling against the plaintiffs, the district court held that by virtue of the intervening decision of the Supreme Court in Califano v. Sanders, 430 U.S. 99 (1977), the district court lacked jurisdiction under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706. The district court also ruled that the exclusive basis for jurisdiction over the federal defendants was §205(g) of the Social Security Act, 42 U.S.C. §405(g), citing Weinberger v. Salfi, 422 U.S. 749 (1975). The Court noted that:

> Under these statutes and decisions, there must first be a hearing and final decision of the Secretary, which may then be appealed to the United States District Court. The plaintiffs have not satisfied these jurisdictional requirements, and for that reason their action must be dismissed.

(See, Appendix A at p. 5a).

It is respectfully submitted that the court below is in error. First, the court in a previous opinion had ruled that it was impossible for plaintiffs to rely upon §405(g) because the appointment of a representative payee was a final action of the Secretary, not subject to administrative appeal or exhaustion of remedies. (See, Appendix B at p. 4b, fn. 8). There the court stated:

> The instant case is an example of a situation where there is no specific administrative procedure for the review of agency action, as there is no basis under §405(g) of the Social Security Act for review of the present claim. Undoubtedly plaintiff Fulk has a non-frivolous claim concerning an alleged deprivation of due process and equal protection and also he alleges that he has been "adversely affected" by the decision of the Secretary to designate a representative payee who also deducted support payments from benefits received on behalf of plaintiff.[8]

[8]The Court finds that the action of the Secretary was "final action" for purposes of §704 of the APA since there is no procedure by which the present claims about the representative payee could be presented to the agency. Therefore no issue of exhaustion of remedies is present in this case.

The court also ruled previously that Weinberger v. Salfi was not applicable to the present case, noting that "the present proceeding is not for review of the Secretary's decision concerning benefits under Title II (of the Social Security Act)", (See, Appendix C at p. 1c).

Second, the court's conclusion that §10 of the APA provides no basis for jurisdiction by virtue of the Supreme Court's intervening decision in Califano v. Sanders, 430 U.S. 99 (1977) does not take into account the fact that plaintiffs' claims are constitutionally based and, therefore, are subject to an express exception enunciated by the Supreme Court in Califano v. Sanders, supra. There the Supreme Court stated

> Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. Furthermore, since federal question jurisdiction under 28 U.S.C. §1331 is precluded by §205(h), Weinberger v. Salfi, supra at 761, a decision denying §205(g) jurisdiction in Salfi or (Matthews v.) Eldridge would effectively have closed the federal forum to the adjudication of colorable constitutional claims. Thus those cases merely adjered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the "extraordinary" step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence.

Califano v. Sanders, 430 U.S. at 108-109, (emphasis supplied). Thus, there exists jurisdiction to hear plaintiffs' constitutional challenges to the representative payee system. Plaintiffs statutory claims under §407 can still be heard in mandamus as the court below had suggested once before. (See, Appendix B at 3b, fn. 5).

2. The plaintiffs' due process claims against federal defendants for losses of social security benefits under old regulations are not rendered moot by the promulgation of new regulation.

With respect to plaintiffs' due process claim against the federal defendants (Count III), the district court ruled that since the regulations for appointing representative payees have changed and now satisfy due process, plaintiffs' due process claim is moot. However, when Fulk's money was taken in 1974, the old regulations were in effect. See, 42 U.S.C. §405 (j) and (l) and 20 C.F.R. §§ 404.1601-1610 (1961) (current version at 20 C.F.R. §§ 404.2001-2010 (1981)). Under those

regulations plaintiffs (1) were not given notice and the opportunity for a hearing regarding the finding of incapability to handle their own social security benefit and (2) were not given notice and the opportunity for a hearing concerning who, assuming their incapability, their representative payees should be. The opinion of the court below does not explain how new regulations subsequent to plaintiffs' loss could cure the seizure by federal defendants of Fulk's money under the old regulations. The old regulations have been recognized as unconstitutional denials of due process. Tidwell v. Weinberger, 73-C-3014 (N.D. Ill. June 23, 1976) (three judge court) aff'd on other grounds 677 F.2d 560 (7th Cir. 1982). At least for those persons whose benefits were turned over to the state under constitutionally infirm procedures, judgment should issue in their favor.

In George Fulk's case, the federal defendant's knew or reasonably should have known that when the hospital's right to receive benefits as representative payee was terminated that social security benefits remained in the hands of the hospital. The failure of the federal defendants to prevent the seizure of these benefits was in bad faith. See Butz v. Economou, 438 U.S. 478 (1978).

3. The Social Security Administration's preference of hospital administrators as representative payees over friends and relatives of institutionalized social security beneficiaries violates the Equal Protection requirement of the Fifth Amendment.

With regard to the merits of plaintiffs' claims against the federal defendants, the court below never addressed Count IV of the plaintiffs' complaint, namely that the SSA preference for hospital payees over friends and relatives of institutionalized beneficiaries violated their right to equal protection of the law. Plaintiffs seek here a ruling on Count IV.

While the Fifth Amendment contains no "equal protection" clause, it has been interpreted to prohibit discrimination that is so unjustifiable as to be violative of due process. Bolling v. Sharpe, 347 U.S. 497 (1954). The Secretary's action of giving preference to TMHC and similar institutions, over the relatives of plaintiff Fulk and the subclass he

represents, constitutes unjustifiable discrimination against Social Security recipients who are confined to Ohio institutions for the mentally ill.

After the decision to make representative payment has been made, the local social security claims representative refers to a list of preferred payees set out in the Social Security Claims Manual. In order of preference they are:

1) A legal guardian; spouse (or other relative who has actual custody or who demonstrates strong interest in the personal welfare of the beneficiary;

2) A friend who has custody or demonstrates strong interest in the personal welfare of the beneficiary;

3) A public or non-profit agency or institution having actual custody;

4) A private, profit-making institution having custody, if licensed under state law.

The Court in Tidwell v. Weinberger, 73-C-3014 (N.D. Ill. 1976) (three judge court) aff'd on other grounds 677 F.2d 560 (7th Cir. 1982), sets forth the test to be applied when scrutinizing the SSA choice of a state institution over a friend or relative for representative payee. Asked by the plaintiffs in that case to declare per se unlawful the selection of a state institution as representative payee under any circumstances, the Tidwell Court observed:

> . . . [W]e cannot say that where a thorough investigation has been conducted and no other payee is suitable that is is per se improper . . . to designate a State official as payee." [Emphasis supplied] Tidwell at p. 12.

The Tidwell court found that the procedures actually used to appoint such a payee violated due process standards. The evidence in this case demonstrates that it is the practice of SSA to ignore its stated policy of preferring the relatives and friends of institutionalized beneficiaries over institutional payees in that there is nothing thorough about the search for relatives and friends to act as payees; and that in spite of the demonstrated unsuitability of Ohio's institutions to serve as representative payees, the SSA continued to allow State hospital superintendents to serve in such capacities.

In the particular case of Mr. Fulk, his sister, Pauline Brill, was available to serve as representative payee, demonstrated an active interest in his welfare, but was never even contacted by the Social Security claims representative. The fact that Pauline Brill's name and address were listed on George Fulk's hospital admission form as the "nearest relative" and "person to notify", and yet was not contacted to serve as representative payee, can only call into serious question the "thoroughness" of SSA's search for a suitable payee other than TMHC.

Apparently George Fulk's experience in this regard was not unique. In a study entitled On Site Review of State Mental Institutions' Performance as Representative Payee "Composite Report of First Cycle Findings 1970-72" SSA Pub. 60-73 (8-73) at pp. 10-17, conducted by SSA of state mental institutions' performance as representative payee it was found that of all the states in the Cleveland-Chicago "Bureau of District Office Operations" SSA Region, Ohio had the largest percentage of beneficiaries with state institutions serving as representative payee who also had relatives or friends who were displaying an active interest in the beneficiaries' well-being. Over 50% of Ohio institutionalized beneficiaries had friends and relatives who were eligible to serve as representative payees, but, nonetheless, had institutional payees appointed to manage their benefits.

It may be surprising that more relatives and friends are not selected to serve as representative payees for institutionalized beneficiaries. But if institutions are in practice preferred, it may not come as a surprise. Two other facts suggest that a preference for institutions exist.

On the one hand, there exists between TMHC and the Toledo District SSA Office a routine system for processing the hospital's representative payee applications. On the other hand, the system is woefully deficient in its techniques to locate relatives and friends to serve as payees.

The likely explanation for this preference of appointing state institutions as representative payees is a common one: money. In 1975, approximately $4,246,900 or 75% of the total income received by institutionalized beneficiaries (excluding Medicaid) was applied to

treatment charges. When the State is representative payee, its fiscal bureaucracy can easily maximize the amounts collected by the Bureau of Support for treatment charges and minimize the amounts available to persons like George Fulk for shoes, clothing and other of life's small amenities. A sister or an old friend might think these things more important to their loved ones' happiness and might, therefore, tend to spend more on personal necessities than on support charges.

But such a system would mean a less certain debt collection mechanism for the State. And so the SSA apparently decided not to put into practice what it preaches to prefer. SSA in fact preferred to leave the system-as-is in tact, with some minor tinkering here and there. Better it was to help the institutional payee remain as payee than it would be to appoint more suitable payees and thereby run the risk of jeopardizing the State Bureau of Support's free access to the income of the mentally ill.

Thus it has been and continues to be a practice of the Secretary and his agents to appoint public institutions, such as TMHC, as representative payees, although persons of higher priority are available. In plaintiff Fulk's case, his sister Pauline Brill was available, but was never even contacted by the claims representative. It appears that the Secretary is not following SSA's own Claims Manual.

In summary, there exists, two classifications of recipients who have representative payees appointed. One class consists of those recipients who are confined to institutions, and for whom such institutions are named representative payee, when other parties of higher priority are available. The other class consists of those recipients who are not confined to institutions, for whom the Secretary appoints representative payees in accordance with established priorities. Those recipients for whom institutions are named as payees are discriminated against for no rational justifiable cause. The result of this discrimination, as in plaintiff Fulk's case, is the loss of social security benefits confiscated by the Bureau of Support as payment for alleged support costs. This loss would not have occurred were a higher priority party, such as plaintiff's sister, been chosen as payee.

Those recipients not confined to such institutions are not faced with this danger and the resulting loss.

This is a clear case of the defendants treating indistinguishable classes of social security recipients differently, to the detriment of those confined in public institutions for the mentally ill. There is no rational basis for this discrimination. This discrimination is, therefore, so unjustifiable as to be violative of the due process clause of the Fifth Amendment of the United States Constitution. Bolling v. Sharpe, 347 U.S. 497 (1954).

4. The federal and state defendants' actions under the representative payee system violated the 42 U.S.C. §407 exemption of benefits from execution, levy, attachment, garnishment or other legal process. Tidwell v. Weinberger, 73-C-3014 (N.D. Ill. 1976) (three judge court) aff'd on other grounds 677 F.2d 560 (7th Cir. 1982).

The district court rules against plaintiffs' claim under 42 U.S.C. §407 because it reasoned that a hospital payee that turned over social security benefits to the Ohio Bureau of Support was not "attaching" or "levying" benefits, but was only doing what federal regulations permit and require, namely, paying institutional charges.

However, this reasoning begs the question of whether federal regulation combined with the appointment of a hospital payee had the effect of violating a federal statute, 42 U.S.C. §407 since it turned the representative payee system into a conduit for the automatic collection of a debt out of social security benefits. On this question the court below had previously observed that:

> Section 407 clearly establishes a right of plaintiff to have social security benefits beyond the reach of state creditors and the duty of the Secretary to designate only persons who will ensure that right.

(See Appendix B at p. 3b, fn. 5)

The appointment of hospital superintendents as representative payees that routinely sign over patients' social security checks (even, as in the case of George Fulk, after the hospital has been stripped of its payee status) without question to the state's collection bureau

does not ensure "the right of plaintiffs to have social security benefits beyond the reach of state creditors". Id.

The district court further reasoned that since federal regulations promulgated by the Secretary create as the highest priority the payment of institutional support charges, benefits paid over to the state "were not in effect garnishing [sic] or attaching benefits but simply doing what the federal regulations required them [hospital payees] to do." (See, Appendix A at p. 4a). However, the Secretary cannot by regulation create a preference for state creditors which Congress by statute has forbidden. The court's opinion allows the Secretary by regulation to repeal Section 407.

The representative payee, as a fiduciary, owes a duty first to the beneficiary. One of plaintiffs' chief contentions was that the hospital had the duty also to use social security benefits for the personal needs of the beneficiaries (clothing, linen, hygiene, comfort items, etc.) which they were ignoring in their practice of turning over most monies to the state collection bureau. Such a balanced use of benefit monies for the personal needs of patients is not "wrongful" as the court seems to suggest. (See Appendix A at p. 4a). Rather, it is consistent with the intent of Section 407, to provide beneficiaries with a measure of well-being beyond the reach of creditors. The actions of the federal defendants deprived plaintiffs of the use of their monies in the same way as they would be if a creditor seized their benefits outright. This conduct violates Section 407. The actions of the state defendants using the "legal process" of the representative payee system for the collection of debts claimed by them also violated Section 407.

In Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973) this court stated that section 407 "imposes a broad bar against the use of any process to reach all social security benefits." Id. at 417. The actions of the federal and state defendants violated that bar.

5. The Fifth Amendment Due Process Clause requires that the Social Security Administration provide adequate written notice and opportunity to be heard prior to the determination that the beneficiary is no longer capable of managing his or her own benefit and prior to appointment of a representative payee.

The district court found that since the commencement of this action the procedures for appointment of a representative payee were substantially revised and that the revised regulations comport with due process. (See Appendix A at p. 5a). To the contrary, the amendments continue to deprive persons adjudicated incompetent of the due process protections of notice and an opportunity to be heard regarding the decision of whether a representative payee is needed.

Under the current Social Security Regulations, beneficiaries adjudicated incompetent in Ohio are simply presumed to be incapable of managing their own funds. Social Security Claims Manual 3017. The beneficiaries are not given notice of the representative payee determination and therefore have no opportunity to rebut the agency's evidence. Furthermore, the representative payee determination is not an "initial" determination and thus no administrative appeal is available. Social Security Claims Manual T 3011.

It is clear that a person must be given adequate written notice and opportunity to be heard before he can be deprived of property. Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1949). The timing and nature of the notice and hearing, if due, depend upon a balancing of factors identified by Matthews v. Eldridge, 424 U.S. 319 (1976):

> First, the private interest that will be affected by official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the value, if any, of additional or substantive procedural safeguards; and finally the government's interest, including the function involved and the fiscal and administrative burden that the additional or substitute procedural requirements would entail. Id. at 336.

An analysis of the Eldridge test demonstrates that the current procedures used by the Social Security Administration do not comport with the requirements of the Fifth Amendment.

1. The Private Interest

In Eldridge, the party whose benefits were improperly terminated could receive full retroactive relief if he ultimately prevailed in his appeal. His sole interest was in the uninterrupted receipt of his benefits. Persons like plaintiff Fulk, who have institutions like TMHC appointed representative payee, have much more at stake. They are deprived of all but $35 of their monthly benefits; the remainder, after rehabilitation/burial funds and "contingency funds" are established, is confiscated by the State to cover alleged support costs. No provision is made for any other needs of the patients such as current maintenance costs of their real and personal property or any other financial needs or obligations either within or outside the hospital. The private interest rises to an even higher level than found in Eldridge, because here, unlike in Eldridge the appeals process might be totally fruitless. Any chance of recouping this loss in the event it is later determined that such representative payment or use of benefits was not proper, may be foreclosed by the doctrine of sovereign immunity. See Edelman v. Jordan, 415 U.S. 651 (1974), and McCauliffe v. Carlson, 520 F.2d 1305 (2nd Cir. 1975). If the Court were to find this doctrine applied, the beneficiaries' loss would be complete and forever. Such recoupment would not be foreclosed, however, where the State does not serve as representative payee.

Another consideration that exists is that here, unlike Eldridge, it is unquestioned that the parties subjected to potential loss are eligible to receive the Social Security Benefits. Even in Goldberg v. Kelly, 397 U.S. 254 (1970), where the Court held that an evidentiary hearing was required, the parties affected may not even have been eligible for those benefits they sought to keep. Further, when a recipient, for whom an institution has been serving as payee is released from that institution, he must go without those benefits to which he is clearly entitled during the length of time it takes for him to be returned to payee status. This usually takes from two to four months. If in that time the State confiscates the benefit payments for past maintenance expenses, as was done to plaintiff Fulk, the beneficiary would still be foreclosed from remedy.

Nor is there any remedy available to the beneficiary against the Social Security Administration. Under 42 U.S.C. 405(k), once payments are made on behalf of a beneficiary to a representative payee, it is a complete settlement by the Social Security Administration of any claims, if otherwise valid. Again the beneficiary is left without a remedy. Thus, where all these factors exist, the private interest (under the analysis of the first part of the Eldridge test) sought to be protected is much greater. It is more than continued free use of benefits. It is protection from outright seizure.

2. The Risk of Erroneous Deprivation

a. The Risk of Deprivation Through Existing Procedures is Great.

The second part of the Eldridge test also focuses on the private interest to be protected in terms of the procedures to be utilized. In using this analysis, it is useful to examine the procedures currently utilized in representative payee determinations in light of whether they are fair and reliable. Eldridge, 324 U.S. at 349. Fairness, the Eldridge Court said, is in the end the ultimate balance to determine when judicial type hearings must be held and their content. Id. at 348.

The procedures utilized and surrounding circumstances in Eldridge differed from those used in representative payee situations. In Eldridge there was an elaborate procedure utilized prior to any determination. Evidence used was "routine, standard and unbiased medical reports by a number of physician specialists. Id. at 344. The question was not truth of the reports, rather the claimant's entitlement. The claimant in the Eldridge situation is usually at liberty, with none of the problems of access to witnesses and evidence an institutionalized beneficiary has. He is in continual touch with the SSA and receives notice of when his benefits might be terminated including a summary of the evidence as well as full access to his files. Id. at 323-324 and 344-346. In addition, the medical reports used to determine whether a disability claimant is in fact entitled to benefits are detailed and objective. The information critical to the entitlement decision usually is derived from medical sources such as the treating physician and often is supported by x-rays and the results of

clinical and laboratory tests. Eldridge, 424 U.S. at 345. Questionnaires as to beneficiary eligibility are detailed. Further, prior to a determination, the beneficiary may submit any additional evidence of his own. In Eldridge, there was also an elaborate and effective appeals process through which the beneficiary, if successful, could receive retroactive benefits. See 20 C.F.R. 404.905 et seq.

Where the State institution is appointed representative payee, none of these safeguards exist. The decision as to whether to appoint a representative payee may be made when it appears to the Secretary that the recipient is incapable of handling benefits in his own interest. 20 C.F.R. §404.1601. The proceedings facing a recipient, such as plaintiff Fulk, are ex parte in nature. The incompetent beneficiary is not even informed that a determination - (1) to determine whether a representative payee is needed, or (2) if so, who the payee should be until after that determination is made. The type of inquiry substantially differs from that in Eldridge. In this case, the evaluation is a conclusory opinion made by a single doctor or psychologist. There are no detailed questions asked or answers sought as to whether the beneficiary is capable of managing his own funds. There is no attempt made to solicit the basis for the doctor's opinion. In the case of institutionalized beneficiaries, the decision is virtually always based upon an attending physician's answer to the following question on SSA Form 787: "In your opinion, is the patient able to manage benefit payments in the patient's own interest?" This is followed by two boxes one to be checked for "yes" and one for "no." See Form SSA-787, Question 6, Plaintiff's Exhibit #6. Further, in the case of institutionalized beneficiaries, the decision is almost always based solely on how these boxes are checked. See, Allen, Ferster and Werhafen, Mental Impairment and Legal Incompetency; Report of the Mental Competency Study (1968) at 118 and 119, a nationwide research study of social security operating procedures.

In Tidwell v. Weinberger, 73-C-3014 (N.D. Ill. 1976) the court recognized in decisions made by the SSA using this evidence that:

> "The question of competency is not susceptible to routine medical judgments and scientific tests. As we understand, often the evidence considered at these determinations consists of little more than conclusory statements made by staff physicians at the institution. Without any opportunity to rebut such statements, benefits could be assigned to a representative payee on the most flimsy of allegations. Thus, in this area where judgments can never be standardized, the need for the minimal safeguard of giving the beneficiary the opportunity to examine and challenge the evidence is great." Tidwell at 16.

Not only is the determination made on this type of "evidence," but the doctor who gives the opinion on which the decision is based usually is an employee of the very institution which also happens to be the beneficiary's creditor for his hospitalization costs under §5121.03 of the Ohio Revised Code. The potential for conflicts of interest to arise is obvious and only serve to enhance the risk of erroneous deprivation. The Social Security Administration itself has identified this problem.

> "Many [SSA] employees fail to recognize the conflict of interest inherent in an institution being payee. On the one hand, the institution is charged by the State with collecting the maximum possible reimbursement for care and maintenance; while the SSA simultaneously requires that the institution protect the interests of the beneficiary as an individual. The two charges are incompatible when the institutional need to collect as much money as possible collides with the trust obligation to put the beneficiaries needs first." On Site Review of State Mental Institutions' Performance as Representative Payee, "Composite Report of First Cycle Findings, 1970-72" Social Security Publication 60-73 (8-73) pp. 16-17, Plaintiffs' Exhibit #7.

Incredibly, patients like Fulk who have been adjudicated legally incompetent are entitled to no notice or opportunity to be heard whatsoever. Tidwell v. Weinberger, 73-C-3014, at p. 15 (N.D. Ill 1976). They have no right even to make a formal appeal of the decision. Claims Manual 3001.(b). This regardless of the underlying constitutionality or propriety of the decision or method of adjudication. For adjudicated incompetents, incapability to manage benefits is presumed. Affidavit of Doggette; Plaintiffs' Exhibit #1 at p. 9.

It has been noted elseqhere that institutionalized beneficiaries, mental patients, should not be presumed to be less capable of handling their assets than the public at large. See Vechionne v. Wohlgemuth,

377 F. Supp. 1361, 1367-68 (E.D. Pa. 1974). At the time this suit was filed, involuntary commitment to a State institution for the mentally ill constituted an adjudication of incompetency. See §5122.36 Ohio Revised Code (Pages 1970). On August 26, 1976 that section was repealed by the Ohio legislature. However, there is good reason to believe that, as far as capability to handle money is concerned, involuntary commitment remains an adjudication of incompetency and therefore, the presumption of the SSA that an involuntarily committed beneficiary is incapable of handling benefits survives as well. Under the present statute:

> Any person in custody, voluntarily or involuntarily under Chapter 5122 retains all rights not specifically denied him under this Chapter or any other Chapter of the Revised Code. §5122.301, O.R.C.

However, §5122.29 specifically limits a patient's rights to handle money. A patient only has the limited right:

> "To keep and spend a reasonable sum of his own money for expenses and small purchases." (Emphasis supplied)

The only logical inference to be drawn from this statutory scheme is that Ohio law presumes that involuntarily committed patients are incompetent to handle all but small sums of money without institutional supervision. This is precisely the scheme which the representative payee system seeks to establish. Thus, it remains likely that involuntary commitment to a mental hospital in Ohio remains an adjudication of incompetency for purposes of presuming the need for appointment of a representative payee without affording a patient notice and an opportunity to be heard under current Social Security guidelines.

Those plaintiffs who are not judged incompetent still receive no notice until after the initial determination is made. Even here the plaintiffs in this case suffer from a burden not born by the Eldridge plaintiff: they are physically restrained of their liberty.

This physical restraint has practical implications which bear on the question of the risk of erroneous deprivation since the beneficiary is limited in his ability to gather and submit to the SSA information beneficial to his case. Even if he can request a reconsideration pursuant

to 20 C.F.R. §404.909 et seq., he cannot leave the institution on his own accord to seek an outside medical evaluation or evaluation of someone trained in money management, which many doctors are not. For the same reason, the beneficiary does not have easy access to evidence, friends or others who could support his capability. Bail is not even a possibility under the laws of Ohio to a patient committed to a State mental hospital, since one must be charged with a criminal offense in order to be entitled to bail. State ex rel. Peaks v. Allaman, 51 Ohio Op. 321 (Ct. App. 1952).

To compound matters he has not right of access to his files that can be effectively exercised, §5122.31 Ohio Revised Code, nor does he even have the right to orally present evidence of his capability, Plaintiffs' Exhibit #1, pp. 12-13. In many cases, he may be drugged so that as a result, he may have even greater difficulty in marshalling facts than he normally would.

The Court in Tidwell concluded that "the need for the minimal safeguard of giving the beneficiary opportunity to examine and challenge the evidence is great." Tidwell, supra at 16. Given the reasons cited, this Court should reach a similar conclusion and hold that plaintiffs are entitled to more due process than they are presently accorded.

b. The Value of Substitute and Additional Procedures.

From the foregoing analysis, it is clear that additional and substitute procedures are needed, as they would serve the value of greatly increasing the reliability and fairness of representative payee determinations where the State is seeking such an appointment.

First, there should be adequate notice to all parties before any determination is made. There should also be an evidentiary hearing. This should include an opportunity to be orally heard, as much revolves around the person's ability to deal with money matters, something not so easily determined from written submissions. In addition, this hearing should be prior to any representative payee determination, particularly if the Court were to find that sovereign immunity was a

bar to any recoupment from the state of monies wrongfully seized. Improved questionnaires to doctors could provide a better evidentiary basis for decision, and, with an independent evaluation, more impartiality. The beneficiaries should also be given assistance in marshalling the evidence needed to present their case. These and other procedures could greatly enhance the accuracy, fairness and reliability of the proceedings, thereby protecting the rights of persons such as plaintiff Fulk.

3. Governmental Interest

The governmental burden would include the administrative and other societal costs associated with requiring adequate notice and hearing procedures prior to a representative payee determination. The Eldridge Court noted that:

> "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. Id., at 348.

Nevertheless, it is obvious from the Court's decision that the added financial cost to be incurred by the right to prior termination evidentiary hearing weighed heavily in their decision. Id., at 348. The Court seemed to be especially concerned about the expense of providing benefits to ineligible recipients pending decision, and felt such expense would be substantial. Id.

This consideration does not exist in the present case. There is no question as to the eligibility of recipients subject to representative payee determinations. Therefore, there would be no costs associated with continuing the status quo pending decision of an evidentiary hearing. The only costs would be those associated with conducting the hearings themselves. The weight to be given to this factor should be minimal, since the Secretary already allows an evidentiary hearing after the determination. Affidavit of Doggette, Plaintiffs' Exhibit ¶1. From a cost standpoint, there is no difference between an evidentiary hearing held prior to and one held after the payee determination, unless the SSA is counting on beneficiaries not to exercise their right to appeal.

Further, the Court in Eldridge said that:

> "More is implicated in cases of this type than an ad hoc weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination of when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." Id., at 348.

The Court went on to say that:

> "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' Goldberg v. Kelly, 397 U.S. at 268-269 (footnote omitted). To insure that they are given a meaningful opportunity to present their case." Id., at 349.

In weighing the relative interests, fairness and the plaintiffs' circumstances require significantly more procedural safeguards.

The administrative costs of other safeguards, existing in Eldridge but not in this case, should be given even less weight, if any at all. The burdens associated with sending written notice to a recipient and allowing him to submit written evidence that may be relevant to the pending determination cannot possibly outweight the potential loss involved. Besides, if it is not too costly to send out notice after the determination it cannot be too costly to do it beforehand.

The administrative costs in this case should not be controlling. As was pointed out in Fuentes v. Shevin, 407 U.S. 67 (1972), at n. 22:

> A prior hearing always imposes some costs in time, effort, and expenses, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right. See Bell v. Burson, supra at 540-541; Goldberg v. Kelly, supra at 261. Procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken.
>
> "The establishment of prompt efficacious procedures to achieve legitiamte state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." Stanley v. Illinois, 405 U.S. 636, 656.

It must be concluded then, after weighing the relevant factors set out in Eldridge and measuring that case with the one before the Court, that the appointment of representative payees pursuant to 42 U.S.C. §405(j) and its associated regulations, without the benefit of prior notice and full evidentiary hearing, amounts to a clear violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

6. The seizure of social security benefits by state officials was in bad faith and violated plaintiffs' rights under 42 U.S.C. §407.

Plaintiffs have set forth previously in this jurisdictional statement the reasons in support of their claim that the state defendants violated plaintiffs' rights under 42 U.S.C. §407. Those reasons are incorporated here by reference. See, supra at p. 12.

The district court rules that even if the seizure of benefits was improper under plaintiffs' claims for relief, no recovery could be had from the State of Ohio because of the Eleventh Amendment, and no recovery from state officials could be had because they were entitled to good faith immunity for their official acts.

Under the Supreme Court's decision in Edelman v. Jordan, 415 U.S. 651 (1973), the Eleventh Amendment bars only retroactive recovery, not prospective relief. Thus, the State could be enjoined from future illegal seizures. The district court failed to provide this relief. As far as recovery against state officials for past seizures is concerned, much of George Fulk's money was seized after the hospital's right to receive benefits as a representative payee had been terminated and the officials so notified. Therefore, the actions of the State officials could not have been in good faith but were a deliberate, last ditch effort to transfer George Fulk's funds to the state's coffers, in spite of their lack of legal authority to do so. Plaintiff Fulk and other members of his class who have been similarly deprived of their funds in bad faith would be entitled to recover this money at least. Wood v. Strickland, 420 U.S. 308 (1975); O'Connor v. Donaldson, 422 U.S. 563 (1975); Sheuer v. Rhodes, 416 U.S. 232 (1974).

CONCLUSION

For the foregoing reasons, appellants request this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

Robin M. Kennedy

February 11, 1983

APPENDIX A

FEB 29 1981

FILED
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CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

George R. Fulk, et al.,

Plaintiffs

vs.

Case No. C 74-230

Timothy B. Moritz, M.D., et al.,

Defendants

OPINION AND ORDER

YOUNG, J.:

This action was originally filed June 13, 1974, as a class action alleging certain violations of the civil rights of the plaintiffs by various state and federal officials. Under the laws then applicable, a three-judge court was required to reach the ultimate resolution of the issues in the case. Such a court was constituted, consisting of The Hon. George C. Edwards of the United States Court of Appeals for the Sixth Circuit, and District Judges Don J. Young and Nicholas J. Walinski of the Northern District of Ohio, Western Division.

Over the period of years that followed, discovery was conducted and various procedural matters were disposed of by order of Judge Young, the District Judge to whom the case was assigned. A conditional class certification was made, motions of the parties for summary judgment were filed and overruled, and various pretrial conferences were held.

Ultimately, it was stipulated by the parties that there were no issues of fact which depended for their resolution upon determining the credibility of witnesses, and that the case would be submitted to the Court upon transcripts of testimony, the exhibits approved by the parties, and written briefs. All this material has been filed and considered by the Court, and the case is ready for final disposition. This opinion will constitute the Court's findings of fact and conclusions of law.

The plaintiffs originally asserted five claims for relief as follows:

1. That the plaintiffs were deprived of their liberty by committment for rehabilitative treatment to institutions under control of the Ohio Department of Mental Health and Mental Retardation,[1] and were required to pay for their daily support and care while in the institution.[2] People incarcerated in state penal institutions under the

1. Title 51, O.R.C. §5122.47.
2. Title 51, O.R.C. §§5121.03, 04, 06 and 40.

In conformity with Rule 77(d) F.R.C.P. please take notice that the following order of judgment was entered in this Court on: September 28, 1981 James S. Gallas, Clerk

Ohio Department of Rehabilitation and Treatment[3] who are given rehabilitation treatment the same as that provided to the plaintiffs are not required to pay for their daily support and care while imprisoned. This is discriminatory toward the plaintiffs and denies them due process and the equal protection of the law;

II. That the state defendants, requiring the plaintiffs to pay for their care and support while committed, did not provide them with adequate and comprehensive psychiatric treatment in accordance with statutory standards, thus depriving them of due process of law;

III. That the federal defendants failed to provide the plaintiffs with procedural safeguards when designating representative payees for benefits to which plaintiffs are entitled under federal law,[4] thus depriving them of their property without due process of law;

IV. That the federal defendants in appointing representative payees for committed persons gave preference to state institutions over relatives of the plaintiffs, thus denying the plaintiffs the equal protection of the law;

V. That the federal defendants designating state institutional officials as representative payees resulted in the state officials being able to collect state support costs without proceeding through state legal processes in violation of the federal statutory provision[5] that exempts Social Security payments from execution, levy, attachment, garnishment or other legal process, therefore rendering the state defendants liable to the plaintiffs for the amounts received as representative payees and paid over to apply to plaintiffs' support obligations to the State of Ohio.

By stipulation of the parties, the plaintiffs' second claim for relief was dismissed without prejudice. Thus, there remain for consideration only four claims, two against the state defendants and two against the federal defendants.

I.

The Claims Against the State Defendants

Basically, the plaintiffs' first claim that it is unconstitutional, as a denial of due process and the equal protection of the law, for the State to charge for support and care to patients who are involuntarily committed to state mental treatment institutions by civil process when no such charges are made to patients who are committed by criminal process.

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3. Title 51, O.R.C. §5120.44.
4. 42 U.S.C. §405(j) and (l); 20 C.F.R. 404.1601-1610.
5. 42 U.S.C. §407.

While most of the cases dealing with this problem deal with persons committed to mental institutions after acquittals of criminal charges by reason of insanity, or persons accused of crime discharged without indictment because of insanity, basically the commitment in such cases is no different from that of those persons committed by civil process. The rationale for such commitment is that the person needs confinement and treatment for the protection of himself and the public. As soon as his condition improves beyond the point when confinement is necessary, the patient is free to return to the community. There is thus a rational basis for the state making a differentiation between such persons and persons covicted of and imprisoned for crime in the matter of support payments. Persons imprisoned for crime may not return to the community until sentence has been served, even though their illness has been relieved.

Perhaps the best expression of this rationale is found in the opinion of the Supreme Court of New Hampshire in the case of In the Matter of Sargent, 116 N.H. 77, 354 A2d 404, 407:

> "There is a rational basis for distinguishing between persons in Sargent's position and prisoners who have been convicted, sent to prison and then transferred to the hospital. They are still prisoners even while at the hospital and when hospitalization is no longer necessary or desirable as to them they are not discharged but must return to the prison under their sentence. The legislature could logically conclude that such prisoners should be kept at the expense of the state when transferred to the hospital while those in Sargent's position should pay if able. The legislature is also entitled to find that it is more desirable and beneficial to be committed to the hospital than to prison. There is thus a rational basis for not charging those confined to the prison who by reason of insanity have not been indicted, are found not guilty or plead not guilty."

In addition to these considerations, there is a basic fallacy in the plaintiffs' assumption that persons sentenced to imprisonment upon conviction of crime cannot be, or are not, charged for their support and maintenance while so imprisoned.

Basically, many, if not most, of such prisoners pay for their support and maintenance by working at many routine tasks, such as cleaning, cooking, food service, maintenance, laundry, and various farming or industrial tasks for little or no wages. Beyond that, prisoners in work-release programs are required to pay for their board in the prison.[6]

Thus, long-standing laws and practices permit the state to require persons involuntarily confined to pay the cost of their support and care when they are financially able to do so. Certainly the state has strong reasons and a rational purpose in making such charges. For this reason also, the plaintiffs' first claim for relief must be denied.

The second of plaintiffs' remaining claims for relief is the claim that although all Social Security benefits are by statute[7] exempt from execution,

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6. Title 51 O.R.C. §5147.28(cX1)
7. 42 U.S.C. §407

levy, attachment, garnishment or other legal process, designating a state official as representative payee in effect is an attachment of the plaintiffs' benefits to pay the state's claims for support and care.

The most serious flaw in this argument is that whoever the designated payee of a social security beneficiary may be, the payee, like any other fiduciary, is required to disburse the payments he receives in accordance with law. It is hard to imagine that an individual designated payee would not be personally liable to the beneficiary for any wrongful expenditure of benefits received.

The regulations for the use of benefits by designated payees,[8] require that the benefits be used for the beneficiary's maintenance, including customary institutional charges when the beneficiary is confined in an institution. The regulations give maintenance and customary institutional charges the highest priority in the expenditure of benefit payments.

Thus, the state defendants, in applying plaintiffs' benefit payments made to them as designated beneficiaries, were not in effect attaching or garnishing the benefits, but simply doing what the federal regulations required them to do.

However, even if it be considered that the collection of the state support payments were improper, the plaintiffs' claim for repayment of the moneys encounters fundamental constitutional problems. The Eleventh Amendment to the Constitution of the United States bars the entering of judgment against a state. The plaintiffs here are seeking to recover moneys paid to the State of Ohio, even though that State is not named as a party.

The named state defendants are all officers or employees of the State, acting in their official capacities in doing what was done here. They are entitled to official immunity for their acts under the doctrine of Scheuer v. Rhodes 416 U.S. 232 (1974), and the later explanatory cases of Wood v. Strickland, 420 U.S. 308 (1975) and O'Connor v. Donaldson, 422 U.S. 563 (1975).

However the problems are approached, it is clear that the claims against the state defendants must be dismissed.

II. The Claims Against the Federal Defendants

The basic problem with the claims against the federal defendants is that in the long period of time that has elapsed since the commencement of this action, there have been substantial changes in the law governing the substantive and procedural aspects of this litigation.

In the procedural aspects of the case, in its rulings of December 11, 1974, March 11, 1976, and April 12, 1976, the Court found that it had jurisdiction pursuant to 5 U.S.C. §702 of the Administrative Procedure Act.[9] However, in 1977 the Supreme Court precluded jurisdiction under §702 over plaintiffs' claims.[10] Somewhat earlier, in Weinberger v. Salfi, 442 U.S. 749 (1975), the Supreme Court held that §205(g) of the Social Security Act provides the exclusive basis for jurisdiction over actions brought for matters arising under the Social Security Act.

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8. 20 C.F.R. 404.1604 and 1606.
9. 5 U.S.C. §§701-706
10. Califano v. Sanders, 430 U.S. 99 (1977).

Under these statutes and decisions, there must first be a hearing and final decision of the Secretary, which may then be appealed to the United States District Court. The plaintiffs have not satisfied these jurisdictional requirements, and for that reason their action must be dismissed.

The substantive claims of the plaintiffs against the federal defendants are based on claimed lack of due process in the appointment of designated payees by the federal defendants. The plaintiffs argue that these appointments were made without giving them either notice or hearing, nor were they given any rights to appeal from the decisions making the appointments.

Whatever the statute may have been when this action was commenced, the record shows clearly and conclusively that the procedures for the appointment of designated payee thereafter were substantially revised.

Section 205(j) of the Social Security Act[11] provides in substance that when it appears to the Secretary that the interest of an applicant entitled to payment would be served thereby, certification of payment may be made for the applicant's use or benefit to a relative or some other person. Certain Social Security Regulations, No. 4[12] and No. 16,[13] and also Part 3 of the Social Security Claim Manual, implement this statute.

Without examining in detail the provisions for notice, hearings, and appeals, some of which became effective November 18, 1975, and some October 1, 1976, it is clear today that at the very least the matter of who shall be named as a designated payee requires full notice and hearing, and is appealable, by proper procedural steps, to the United States Courts.

Originally, a three-judge court of the Northern District of Illinois found, in the case of Tidwell, et al. v. Weinberger, Nos. 73-6-3014 and 74-6-183 (June 23, 1976), that the earlier provisions did not comport with due process. However, upon a later motion by the defendant in these cases to alter or amend the judgment, that Court held that it had examined the revised regulations and found that they comport with due process.

This Court agrees with the conclusions of the Tidwell court. Even if this Court had jurisdiction to determine the issue, it would find that the plaintiffs' substantive claims are without merit, and this action should be dismissed.

THEREFORE, for the reasons stated, good cause therefor appearing, it is

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11. 43 U.S.C. §405(j).
12. 20 C.F.R. §§404.1601-404.1610
13. 20 C.F.R. §§416.607-416.690.

ORDERED that this action be dismissed, and the defendants may go hence without day.

Edwards, Circuit Judge, and Walinski, Judge, concur.

IT IS SO ORDERED.

United States Circuit Judge

United States District Judge

Sr. United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
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U.S. DISTRICT COURT
NORTHERN DISTRICT
OF OHIO

George R. Fulk, et al.,

Plaintiffs,

vs.

Kenneth D. Gaver, et al.,

Defendants.

Civil No. C74-230

MEMORANDUM AND ORDER

0 0 0

YOUNG, J:

This cause came to be heard upon motion filed by defendants Casper Weinberger, Secretary of Health, Education and Welfare (hereinafter Secretary) and James Cardwell, Commissioner of the Social Security Administration (hereinafter Commissioner) for dismissal under Rule 12(b)(6) Fed. R. Civ. P. for lack of subject matter jurisdiction. The Commissioner also seeks dismissal apparently contending that only the Secretary is the proper defendant in an action under Title II of the Social Security Act, 42 U.S.C. §401 et seq.

Plaintiff in this class action complaint seeks relief concerning several procedures affecting persons involuntarily committed to state mental health institutions. As to the federal defendants, the relevant claims concern the procedure by which a representative payee is determined for a person involuntarily committed who is entitled to social security benefits and further to prevent designation of a representative payee who could defeat a social security recipient's right to have monies received by the representative payee free from execution, levy, attachment, garnishment or other legal process.

Plaintiff claims in the original complaint that this Court has jurisdiction over the controversies herein under 28 U.S.C. §1337, 28 U.S.C. §1343(3) and (4) and 28 U.S.C. §1361. In his amended complaint, plaintiff also alleges jurisdiction pursuant to 5 U.S.C. §702 (Administrative Procedure Act §10(a)) and pendent jurisdiction.[1] The federal defendants challenge all bases of jurisdiction.

As to jurisdiction over the claims under 28 U.S.C. §1337,[2] the Court finds that no jurisdiction is conferred by §1337 in this Court over plaintiff's claims against the federal defendants. It is clear that the Social Security Act is not an act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

1. Plaintiff contends that the amended complaint should be filed as a matter of course because the federal defendants affected thereby had filed only a motion to dismiss which is not a responsive pleading for purposes of Rule 15(a). Ohio Casualty Ins. Co. v. Farmers Bank, 178 F.2d 570, 573 (6th Cir. 1949); Kroger Co. v. Adkins Transfer Co., 284 F. Supp. 374 (M.D. Tenn. 1968). However, considering all the defendants to the action, the state defendants had filed their answer to the original complaint prior to the lodging of the amended complaint. While the amended complaint therefore may not be filed as a matter of right, the Court will permit plaintiff to file his amended complaint.

2. 28 U.S.C. §1337 provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Aguayo v. Richardson, 473 F.2d 1090, 1101 (7th Cir. 1973); Almenares v. Wyman, 453 F.2d 1075, 1082 n.9 (2d Cir. 1971); Romeriz v. Weinberger, 363 F. Supp. 105, 108 (N.D. Ill. 1973), aff'd mem. 94 S. Ct. 1553 (1974).

It is likewise obvious that there is no jurisdiction over plaintiff's claims as to the federal defendants under 28 U.S.C. §1343(3) and (4) because there is no allegation that the Secretary or the Commissioner acted under the color of state law.

The question of jurisdiction under 28 U.S.C. §1361 is the battleground upon which the parites pitched their most concentrated efforts. The Secretary argues essentially that the duty of designating representative payees is strictly discretionary and thus beyond the scope of the traditional writ of mandamus.

The Court agrees that the selection of a representative payee under the Social Security Act and regulations thereunder is a discretionary function.[3] However, plaintiff does not challenge the particular selection of the Secretary, but rather challenges the procedure by which the designation was made by the Secretary and the alleged result of having a representative payee from whom support payments out of social security benefits were collected without resort to the state legal processes which violates 42 U.S.C. §407.

It is obvious that there are divergent and conflicting interpretations of the Mandamus and Venue Act of 1962, 28 U.S.C. §1361. See Byse & Fiocca, Section 1361 of the Mandamus and Venue Act and "Nonstatutory" Review of Federal Administrative Action. 81 Harv. L. Rev. 308 (1967). The Court concludes from a reading of the legislative history that the revision of the remedy of mandamus in 1962 did not change the basic nature of the action "in the nature of Mandamus," but rather the legislation attempted to make the remedy of mandamus available in district courts outside the District of Columbia.[4] Under traditional interpretation, three elements must co-exist before a writ of mandamus will issue:

(1) a clear right in the plaintiff to the relief sought;

(2) a clear duty on the part of the defendant to do the act in question; and

(3) no other adequate remedy available.

Carter v. Seamons, 411 F.2d 767, 773 (5th Cir. 1969); Elliott v. Weinberger, 371 F. Supp. 960, 968 (D. Haw. 1974). Thus a key issue in a mandamus action is the existence of a duty being owed a person which a government

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3. Merely categorizing an administrative act as discretionary, however, should not end the inquiry as to §1361. The inquiry in a mandamus proceeding should be based upon whether the action taken was within the scope of the authority delegated to the administrative official. See Byse and Fiocca, infra at 332-35.

4. S. Rep. No. 1992, 87th Cong., 2d Sess. 1 (1962); H. Hart & H. Wechsler, The Federal Courts and the Federal System, 1383 (2d ed. 1973); Byse & Fiocca, supra at 313-18. See K. Davis, Administrative Law Treatise §23.10 (Supp. 1970) (hereinafter Davis).

official refuses to perform.

In the present case, plaintiff is seeking to have this Court, through this proceeding, declare that when the Secretary makes a designation of a representative payee there is a constitutional right of a social security recipient to have prior written notice, prior hearing including the right of confrontation of witnesses and the right to present evidence, a reasoned written opinion and the right of appeal. The Court finds that at the present time, there is no statutory duty nor duty imposed by constitutional principles to afford plaintiff the procedures requested. The Court does not find, and plaintiff has not pointed out, any previous court decision involving the precise question presented in the instant suit. It seems that plaintiff seeks to have this Court extend principles established by other precedents to attain the relief sought in this case. Regardless of what will be the outcome upon the merits, at the present time for purposes of jurisdiction the Court finds that the Secretary is under no duty to plaintiff and the class he represents to afford the procedures outlined above. Plaintiff appears to contend that jurisdiction can be demonstrated by what may possibly result from the litigation. This bootstrap argument is insufficient to establish jurisdiction for a proceeding in mandamus under §1361 as to the claims for designation of a representative payee.[5]

The Court finds, however, that it has jurisdiction over the claims concerning the federal defendants pursuant to §702 of the Administrative Procedure Act, 5 U.S.C. §701-706 (hereinafter APA). The Court recognizes that it is still an open question whether §702 of the APA is a jurisdiction grant or something less than jurisdictional.[6] The Supreme Court in Rusk v. Cort, 369 U.S. 367 (1962) seems to have assumed that the APA provides an independent jurisdictional basis. Subsequent lower court decisions are in conflict on this point.[7]

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5. The Court at the same time concludes that a different result would obtain as to jurisdiction under §1361 over the claim contained in Count Five of the complaint, which concerns the designation of representative payees which allegedly violates 42 U.S.C. §407. It appears that §407 clearly establishes a right of a plaintiff to have social security benefits beyond the reach of state creditors and the duty of the Secretary to designate only persons who will ensure that right. However, since the Court concludes, as is stated hereinafter, that the APA provides a jurisdictional basis to review the Secretary's actions, mandamus is not proper because there is available another adequate remedy.

6. §702 of the APA provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute, is entitled to judicial review thereof.

7. Among the case concluding, or assuming, that the APA is an independent grant of jurisdiction are: Washington v. Udall, 417 F.2d 1310, 1319-20 (9th Cir. 1969); Brennan v. Udall, 379 F.2d 803, 809 (10th Cir.), cert. denied, 389 U.S. 975 (1967); Cappadora v. Celebrezze, 356 F.2d 1, 5-6 (2d Cir. 1966); McEachern v. United States, 321 F.2d 31, 33 (4th Cir. 1963); Estrada v. Ahrens, 296 F.2d 690, 695 (5th Cir. 1961); Citizens Organized to Defend the Environment v. Volpe, 353 F. Supp. 520, 523 (S.D. Ohio 1972). The opposite conclusion was reached in Zimmerman v. United States Government, 422 F.2d 326, 330 (3d Cir. 1970); Twin Cities Chippewa Tribe Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 532 (8th Cir. 1967); Kansas City Power & Light Co. v. McKay, 225 F.2d 924, 933 (D.C.Cir.), cert. denied, 350 U.S. 884 (1955).

The legal scholars have generally agreed that the APA should be read to contain a jurisdictional grant. Davis, supra at §23.02; Byse & Fiocca, supra at 330.

The Court concludes that §702 of the APA should be read to contain a grant of jurisdiction for review of administrative action until there is a more definitive ruling from the Supreme Court or the United States Court of Appeals for the Sixth Circuit. An alternative conclusion would result in persons having no means to redress a wrong resulting from an administrative agency's action where there is no specific statutory review procedure. The instant case is an example of a situation where there is no specific administrative procedure for the review of agency action, as there is no basis under §405(g) of the Social Security Act for review of the present claim. Undoubtedly plaintiff Fulk has a non-frivolous claim concerning an alleged deprivation of due process and equal protection and also he alleges that he has been "adversely affected" by the decision of the Secretary to designate a representative payee who also deducted support payments from the benefits received on behalf of plaintiff.[8] The Court concludes that there should be some means for review of the agency action such as occurred in this case, and the APA is a logical basis.

Since the Court concludes that jurisdiction exists under the APA, the issue of pendent jurisdiction need not be reached.

One additional point must be resolved. Defendant Cardwell apparently seeks dismissal by arguing that the proper defendant in an action under Title II of the Social Security Act is solely the Secretary. The simple answer to that argument is that the present proceeding is not for review of the Secretary's decision concerning benefits under Title II but rather seeks redress concerning the procedure for the designation of the representative payee by nonstatutory review under the APA.

The motion to dismiss filed by the defendants Weinberger and Cardwell must be denied.

Therefore, for the reasons set forth herein and for good cause appearing, it is

ORDERED that the motion to dismiss filed by defendants Weinberger and Cardwell should be and hereby is denied, and it is

FURTHER ORDERED that the amended complaint lodged with the clerk on September 17, 1974, should be and it hereby is ordered to be filed by the clerk.

United States District Judge

8. The Court finds that the action of the Secretary was "final action" for the purposes of §704 of the APA since there is no procedure by which the present claims about the representative payee could be presented to the agency. Therefore no issue of exhaustion of administrative remedies is present in this case. See Morris v. Richardson, 346 F. Supp. 494, 495 (N.D. Ga. 1972); Gainville v. Richardson, 319 F. Supp. 16, 18 (D. Mass. 1970).

Toledo, Ohio.

In conformity with Rule 77 (d) F.R.C.P. please take notice that the following order of judgment was entered in this court on Dec. 12, 1974

APPENDIX C

FILED
1982 OCT 15 AM 8 28
CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT
TOLEDO, OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

George R. Fulk, et al.,

Plaintiffs

Case No. C 74-230

vs.

Timothy Moritz, M.D., et al.,

MEMORANDUM AND ORDER

Defendants

YOUNG, J.:

This cause is before the Court on the plaintiffs' motion to alter or amend the judgment and for re-hearing. Defendants have opposed this motion.

Plaintiffs originally brought this action in 1974, challenging certain practices of state and federal regulations requiring those who were involuntarily committed to mental institutions to pay for their care, if financially able to do so. Plaintiffs also attacked the procedures whereby their social security payments were paid to state officials to defer the cost of their keep. Under the laws then applicable, a three-judge Court was constituted to hear the case.

On September 28, 1981, the Court, all three judges concurring, dismissed the action as to both the state and federal defendants. In the present motion brought pursuant to Rule 59 of the Federal Rules of Civil Procedure, plaintiffs ask the Court to alter or amend the findings. In fact, plaintiffs do not seek an alteration or amendment of the judgment; they seek a wholesale reversal and entry of judgment in their favor.

The Court is of the opinion that a Rule 59 motion is improper here, as it is an attempt to re-argue the applicable law. Full consideration was given to plaintiffs' legal theories. In a six-page opinion, the three-judge Court held that it lacked jurisdiction over the claims against the federal defendants, and that the claims against the state defendants were without merit. A motion under Rule 59 to alter or amend the judgment cannot be used as a substitute for appeal.

Erickson Tool Company v. Balas Collet Company, 277 F. Supp. 226, 234 (N.D. Ohio 1967) aff'd, 404 F.2d 35 (6th Cir. 1968); Durkin v. Taylor, 444 F. Supp. 879, 889 (E.D. Va. 1977).

Plaintiffs vigorously assert that "the Court is in error" as to its legal conclusions. (Memorandum in Support of Motion, p. 4). It may be that the Court did err; however, the remedy is to file an appeal, not re-argue the legal issues in the same forum. The Court believes it reached the proper conclusion in its prior opinion rejecting the plaintiffs' claims. If it did not, the avenue of appeal is yet open to them to have the alleged error corrected.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that plaintiffs' motion to alter or amend the judgment and for re-hearing should be, and it hereby is OVERRULED.

Edwards, Circuit Judge, and Walinski, Judge, concur.

IT IS SO ORDERED.

United States Circuit Judge

United States District Judge

Sr. United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

GEORGE R. FULK, et al.,	:	Case No. C-74-230
Plaintiffs,	:	CIVIL ACTION
v.	:	
TIMOTHY MORITZ, M. D., et al.,	:	
Defendants.	:	

FILED
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U.S. DISTRICT COURT
NORTHERN DIST. OHIO

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that George R. Fulk, et al., the plaintiffs above named, hereby appeal to the Supreme Court of the United States from the final order overruling plaintiffs' motion to alter or amend judgment entered in this action on October 15, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Robin M. Kennedy

Robin M. Kennedy
Counsel for Plaintiffs
The University of Toledo
College of Law Legal Clinic
2801 W. Bancroft Street
Toledo, Ohio 43606
(419) 537-4236

CERTIFICATE OF SERVICE

Copies of the foregoing Notice of Appeal to the Supreme Court of the United States were sent by ordinary mail, this 13th day of December, 1982 to the following:

Alan G. Gelbman, Assistant Attorney General
615 W. Superior Avenue, Room 810
Cleveland, Ohio 44113

Robert F. Kobee, Assistant Attorney General
431 East Broad Street, P. O. Box 2398
Columbus, Ohio 43216

Counsel for state defendants;

Patrick J. Foley, Assistant United States Attorney
1716 Spielbusch Avenue
Toledo, Ohio 43624

Jack Wajciechowski, Esq.
Office of the General Counsel
Social Security Administration
Department of Mental Health and Human Services
6401 Social Security Blvd.
Baltimore, Maryland 21235

Counsel for federal defendants;

Deborah A. Piperni, Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215

John H. Kennedy

Counsel for Plaintiffs
The University of Toledo
College of Law Legal Clinic
2801 W. Bancroft Street
Toledo, Ohio 43606
(419) 537-4236